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No. 06-728

IN THE

Supreme Court of the United States

JACK MURPHY, INDIVIDUALLY
AND AS A MEMBER OF AK CAPITAL LLC, ETC.,
Petitioner,

v.

KOREA ASSET MANAGEMENT CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR POWEREX CORP. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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December 22, 2006

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, Powerex Corp. ("Powerex") moves for leave to file the accompanying brief as *amicus curiae* in support of respondent. Neither petitioner nor respondent consented to the filing of the brief, necessitating this motion.

Powerex is the petitioner in two pending cases that present a question of the proper legal standard to be applied in determining whether a foreign entity is an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(2) ("FSIA"). *See Powerex Corp. v. Reliant Energy Servs., Inc.*, No. 05-85 (filed July 15, 2005); *Powerex Corp. v. California ex rel. Lockyer*, No. 05-584 (filed Nov. 4, 2005). Powerex thus has a substantial interest in this Court's resolution of that important question, which has divided the federal courts of appeals. *See* Brief for the United States as *Amicus Curiae* at 8-13,

Powerex Corp. v. Reliant Energy Servs., Inc., Nos. 05-85 & 05-584 (filed Nov. 14, 2006) (discussing the conflict in the courts of appeals and the importance of the issue).

The petition in this case purports to raise that issue. But, for numerous independent reasons, this case is an inappropriate vehicle in which to resolve the circuit conflict over the interpretation of the FSIA organ prong. Those reasons include the following: petitioner has not argued that the court below applied an incorrect legal standard; he would lose even under the Ninth Circuit's organ-status test, which is more favorable to his position; petitioner contends that there is not a properly developed factual record; and petitioner seeks review of an unpublished summary order of the Second Circuit.

Powerex's petitions present superior vehicles for resolving the circuit conflict identified by the United States in its invitation brief in Nos. 05-85 and 05-584. In this brief, Powerex compares and contrasts this case and No. 05-85 and explains why the Court should grant certiorari in No. 05-85 instead of this case. In so doing, Powerex debunks two supposed vehicle problems raised by the respondents in No. 05-85 – namely, that No. 05-85 is moot and that 28 U.S.C. § 1447(d) bars appellate review in that case. Both assertions are false. That case is not moot, nor will it become moot before the end of the 2006 Term. And § 1447(d) is inapplicable in No. 05-85. That provision bars review of remand orders only when there is a defect in removal procedure or a lack of subject-matter jurisdiction. There was neither in No. 05-85. The entire case was properly removed – both procedurally and jurisdictionally – by parties whose right to remove was undisputed.

Powerex should be granted leave to file the attached *amicus* brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Court should grant certiorari to review the court of appeals' unpublished summary order affirming the district court's application of settled circuit precedent interpreting the Foreign Sovereign Immunities Act of 1976 to the facts of this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation incorporated under British Columbia's Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

ARGUMENT

I. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

For at least six independent reasons, this case presents an unsuitable vehicle for resolving the question presented. First, petitioner does not argue that the court of appeals applied the wrong legal standard, and, in any event, he has waived any such argument. Second, even under the Ninth Circuit's test for organ status, respondent Korea Asset Management Corporation ("KAMCO") qualifies as an organ of the government of Korea. Third, petitioner contends that this case lacks a properly developed factual record, which, if true, would limit the guidance the Court could provide in this case. Fourth, this petition arises from an unpublished summary order of the Second Circuit. Fifth, the foreign-relations concerns motivating review in Nos. 05-85 and 05-584 are absent here. Sixth, even if petitioner could overcome KAMCO's immunity defense under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), his suit has no merit as a matter of law because it is an improper derivative action.

A. Petitioner Has Waived A Challenge To The Legal Test For Organ Status

Petitioner has neither presented nor preserved an argument that the Second Circuit committed an error on a point of law warranting this Court's review. In this Court, petitioner's principal complaint is with the manner in which the lower courts *applied* the Second Circuit's standard for determining whether a foreign entity is an organ of a foreign state under the FSIA. *See* Pet. 21.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

(And he concedes that the Second Circuit applies essentially the same standard as do the Third and Fifth Circuits. *See* Pet. 19 n.14.) Petitioner does not contend that the Second Circuit should have adopted a different legal standard, such as the test created by the Ninth Circuit in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), *petition for cert. pending*, No. 05-85 (filed July 15, 2005). Nor does he contend that he would have prevailed under that standard. Moreover, petitioner has waived any argument that the Second Circuit employed the wrong test because, in his brief in that court, he argued exclusively that the district court misapplied the Second Circuit's test. *See* Pet'r C.A. Br. 18-21, 25-35.

B. Petitioner Would Not Prevail Even Under The *NRG Energy* Test

Even if the petition could be construed as a request for this Court to adopt the restrictive, mechanical test established by the Ninth Circuit in *NRG Energy*, petitioner would not benefit from this Court's adoption of that test. KAMCO is plainly an organ of the Republic of Korea under both of the prevailing approaches to organ status (*i.e.*, the contextual standard that governs in the Second, Third, and Fifth Circuits and the rigid standard applied in the Ninth Circuit). In *NRG Energy*, the Ninth Circuit held that Powerex's "high degree of independence from the government of British Columbia"; its "lack of financial support from the government"; and "its lack of special privileges or obligations under Canadian law *dictate[d]* [the] holding that Power[e]x is not an organ of British Columbia." 391 F.3d at 1026 (emphasis added). Here, the district court found that KAMCO satisfied all three of the criteria that the Ninth Circuit found dispositive in *NRG Energy* in findings of fact that are subject to review for clear error.

First, the district court found that KAMCO is not highly independent from the Korean government. Instead, the Korean government actively supervises KAMCO. *See* Pet. App. A12-A13, A33-A34. Among other things, the Korean

Financial Supervisory Commission – which is an agency of the Korean government reporting directly to the nation's president – has the authority to appoint and to remove KAMCO's auditor and to approve or to reject the KAMCO shareholders' choice to be the firm's managing director. *See id.* at A12. The Commission also reviews the Resolution Fund's books at the end of each fiscal year. *See id.* Government officials from the Ministry of Finance and Economy, the Ministry of Planning and Budgeting, the Korea Development Bank, and the Financial Supervisory Service, which is the executive arm of the Financial Supervisory Commission, sit on KAMCO's Management Committee, which initiates all changes to KAMCO's operational and budget policies. *See id.* at A12-A13. Furthermore, under certain circumstances, KAMCO is subject to the Korean Framework Act on the Management of Government Affiliated Institutions ("FAGAI"), under which its management objectives, business plans, and budgets are subject to adjustment and review by the Korean government. *See id.* at A13. Multiple agencies of the Korean government exercise supervisory authority over KAMCO's administration of the Resolution Fund – namely, the Public Fund Oversight Committee of the Ministry of Finance and Economy, and the auditing authority of the Korean National Assembly's Board of Audit and Inspection, which is responsible for auditing all agencies of the Korean government. *See id.* at A12.

Second, the district court found that KAMCO receives significant financial support from the Korean government. The government initially financed the Resolution Fund, which KAMCO administers, largely from the proceeds of government-guaranteed bonds. *See id.* at A9. Furthermore, under Korean law, the government may guarantee the repayment of debentures issued by KAMCO. *See id.* at A11. And it can make capital investments in KAMCO or support KAMCO's expenses, meaning that the government "can assume KAMCO's debts, pay its employees, or provide any other financial support it deems necessary." *Id.* at A12.

Third, the district court found that Korean law affords KAMCO substantial special privileges and imposes important obligations. KAMCO's privileges include the exclusive right to use the Resolution Fund to acquire and to dispose of non-performing loans held by Korean financial institutions. *See id.* at A35. Moreover, KAMCO is exempt from certain national and local taxes. *See id.* at A11. When acquiring non-performing loans through the Resolution Fund, KAMCO has the obligation to consult with government authorities and to pay above-market prices for those loans – "in effect subsidizing the holder of the bad debt." *Id.* at A10. Further, KAMCO does not account for any profits and losses generated by those loans on its books; all profits are remitted to the bondholders who financed the Resolution Fund. *See id.* Additionally, KAMCO is subject to suit as a governmental agency under the Korean Administrative Act, and its employees are subject to liability as governmental officials under the Korean Criminal Act. *See id.* at A36.

In sum, even under the rigid standard adopted by the Ninth Circuit in *NRG Energy*, the conclusion of the district court in this case that KAMCO is an organ of the Korean government under the FSIA would be sustained. This case is therefore a poor vehicle for resolving the circuit conflict over the legal standard to be applied in reviewing claims of organ status under the FSIA, because, under any available standard, the result would be the same.

C. The Factual Record Is Disputed

This case is also a poor vehicle because a dispute exists over whether the factual record is properly developed. In this Court, petitioner asserts that the district court erred in failing to hold a hearing on the FSIA issues. *See, e.g.*, Pet. 22 ("[T]he district court dismissed the complaint without even conducting a hearing to settle the critical factual and legal disputes that flared among conflicting experts' affidavits regarding application of the Foreign Sovereign Immunities Act."), 24 ("Here, the factual and

legal issues in dispute could not be readily resolved from the written submissions."). Although KAMCO disagrees that the district court erred in resolving KAMCO's motion to dismiss without a live hearing, under *petitioner's* view of this case, further factual development is necessary to ascertain the facts on which any determination of KAMCO's status as a foreign sovereign must be based. Thus, even if this Court were to conclude that the Second Circuit applied an incorrect legal standard, the case would have to be remanded for additional factual development. A case that raises the legal test for organ status on an undisputedly closed evidentiary record would be a better vehicle to resolve the question presented because it would permit the Court both to articulate and to apply the proper legal standard for determining organ status. Such a case, which is presented in No. 05-85, would provide the best guidance to foreign sovereigns in organizing their affairs and to the bar in litigating FSIA organ-status questions in United States courts.

D. The Second Circuit's Judgment Is A Non-Precedential Summary Order

Additionally, this case is an undesirable vehicle for this Court's review because the court of appeals' decision in this case is an unpublished summary order. Ordinarily, this Court eschews reviewing unpublished decisions of the courts of appeals because they lack precedential value in the court that issued them. *See* 2d Cir. R. § 0.23 (unpublished summary orders "shall not be cited or otherwise used in unrelated cases before this or any other court"). Here, petitioner asks this Court to review a summary order affirming a comprehensive district court decision. Although this Court occasionally reviews decisions in unpublished orders, there is nothing extraordinary about this case that might warrant such unusual treatment.

E. No Issue Of Foreign Relations Is Presented Here

Unlike Nos. 05-85 and 05-584, concerns of international comity do not support a grant of certiorari in this case. In

Nos. 05-85 and 05-584, the governments of Canada, British Columbia, and the United States have all filed briefs urging this Court to grant review and to reverse the Ninth Circuit, in part because of the substantial foreign-relations problems posed by the Ninth Circuit's rejection of Powerex's sovereign status. The foreign-affairs concerns implicated in those cases are not present here, where the foreign entity prevailed in the lower courts and, in any event, would not face litigation in state court. (Petitioner did not move to remand this case, and he does not dispute that, if KAMCO were not an organ of a foreign state entitled to a federal forum under the FSIA, complete diversity would exist to support jurisdiction under 28 U.S.C. § 1332(a)(2). *See* Pet'r C.A. Br. 1.) If anything, diplomatic concerns weigh against review here, because in this case and *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004), the Second Circuit has vindicated claims of sovereignty by Korean governmental entities.

F. Petitioner's Suit Is An Improper Derivative Action

Finally, resolution of the question presented is irrelevant to the outcome in this case. Petitioner purports to bring this suit as a derivative action on AK Capital's behalf. *See* Pet. 3, 10. But it is well-settled that a corporate shareholder, such as petitioner, cannot bring a derivative action unless the corporation itself has failed to take any appropriate action to remedy the alleged wrong.[2] Here, AK Capital is currently prosecuting an arbitration arising out of the same facts that form the basis of petitioner's derivative action. *See* Resp. C.A. Br. 20-21. Because AK Capital has sought to enforce its legal rights, petitioner

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[2] *See, e.g.*, 19 Am. Jur. 2d *Corporations* § 1946 (2006) ("A shareholder derives the power to pursue a derivative action from the unexercised authority of the corporation; thus, a derivative action may be brought *only if the corporation*, because it is controlled by the wrongdoers or for other reasons, *fails or refuses to take appropriate action* for its own protection.") (emphases added; footnote omitted).

cannot enforce those same rights.[3] Thus, even in the unlikely event that the FSIA issues were to be decided against KAMCO, petitioner's suit would still have to be dismissed as an improper derivative action. Because the FSIA organ-status inquiry would appear to be ultimately irrelevant to the outcome of this case, the Court should resolve the conflict over organ status in a case such as No. 05-85, where the resolution of the conflict will be of continuing significance to Powerex.

II. *POWEREX v. RELIANT ENERGY SERVICES, INC.*, No. 05-85, IS A GOOD VEHICLE FOR RESOLVING THE CONFLICT IN THE CIRCUITS

The respondent-plaintiffs in No. 05-85 have identified two purported problems with that case as a vehicle for resolving the important circuit conflict – which has now been recognized by the United States[4] – over the interpretation of the FSIA's organ prong. First, those plaintiffs have asserted that No. 05-85 is or will soon be moot. Second, they have contended that 28 U.S.C. § 1447(d) bars appellate review in that case because the district court remanded the case to state court.

Neither of those supposed vehicle problems presents an obstacle to this Court's review. The case is not moot, nor will it become moot before this Court could decide it. Furthermore, § 1447(d) does not apply in No. 05-85. The case was properly removed by two federal agencies and an undisputed foreign sovereign. Thus, there was neither a defect in removal procedure nor a lack of subject-matter jurisdiction, meaning that the remand order was not one of the kinds of remand orders to which § 1447(d) applies. In

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[3] It is irrelevant that AK Capital is pursuing its rights against a different defendant – Hanbo Steel's bankruptcy trustee – particularly in light of the settled rule that an injured party is entitled only to one full recovery. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* 330-31 (5th ed. 1984).

[4] *See* Brief for the United States as *Amicus Curiae* at 8-12, *Powerex Corp. v. Reliant Energy Servs., Inc.*, Nos. 05-85 & 05-584 (filed Nov. 14, 2006) ("U.S. Br.").

any event, § 1447(d) does not prohibit appellate review of a district court's rejection of a foreign entity's FSIA claim simply because that ruling accompanies a remand order.

Finally, Powerex notes one point that has not been disputed by the respondents in Nos. 05-85 and 05-584: Powerex's status as an agency or instrumentality of a foreign state entitled to the protections of the FSIA is a recurring issue with tremendous significance for the bilateral diplomatic and economic relationship between the United States and Canada.

A. No. 05-85 Is Not Moot

As the United States correctly concluded in its brief, a live controversy in No. 05-85 will continue while objections to the state-court approvals of the class-action settlement are litigated in the California appellate courts. *See* U.S. Br. 20 ("[T]he petition is not now moot, and this Court would almost certainly resolve the case before the settlement between the plaintiff and respondent cross-plaintiffs becomes final."). That appellate process has only just begun and, even if all objections are rejected, it will not run its course until well after the conclusion of O.T. 2006.

1. No. 05-85 arises out of consolidated actions originally filed in California state court by plaintiffs (respondents there) against a number of defendants (also respondents there), including Reliant Energy Services, Inc. *See* No. 05-85 Pet. App. 7a. Reliant brought cross-claims against Powerex and others. *See id.* The plaintiffs and Reliant have entered into a settlement agreement. And Reliant has agreed with the other cross-defendants – but not with Powerex – to have the cross-complaints dismissed. But those dismissals, moreover, are subject to a significant qualification – the cross-complaints will be reinstated if the settlement between the plaintiffs and Reliant is not finally approved by the state courts. Powerex has not agreed to a dismissal on those terms, and Reliant's cross-claims against Powerex have not been dismissed.

The state trial court has approved the settlement between the plaintiffs and Reliant, over objections. Two of the objecting parties – the State of Montana and a private individual – have appealed the state trial court's approval of the settlement. If either of those parties prevails on appeal, the settlement could unravel, the plaintiffs could re-assert their claims against Reliant, and Reliant could pursue its cross-claims against Powerex.[5]

2. The appeals almost certainly will not be resolved before the end of O.T. 2006. Currently, the briefs of the appellant-objectors are due just before and after January 1, 2007, and Montana has requested an extension of 30 days within which to file its brief. If Montana's extension request is granted and the appellees obtain no extensions on their briefs, then briefing would be completed in mid-to-late March 2007. *See* Cal. R. Ct. 8.212(a) (answering brief due 30 days after the opening brief; reply brief due 20 days after the answering brief). Under the state appellate court's normal practice, the oral argument would be expected to occur in mid-to-late May, with a decision by the California court of appeals within one month (mid-to-late June). We understand, however, that California courts routinely grant extensions of up to 75 days to file appellate briefs. *See* Cal. R. Ct. 8.212(b); *id.* 8.220(a), (d). If some or all of the parties obtain extensions, then that timeline would be extended by weeks or months. A decision by a California court of appeal does not become final until 30 days after the decision is filed. *See id.* 8.264(b)(1).

Once the California appellate court's decision is final, the parties will have 10 days to seek review of that decision by the California Supreme Court. *See id.* 8.500(e)(1).

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[5] Thus, the respondent-plaintiffs in No. 05-85 rightly do not contend that the case is actually moot. *See* Response of Plaintiffs and Respondents to Brief for the United States as *Amicus Curiae* at 3, No. 05-85 (filed Nov. 27, 2006) ("While counsel for Plaintiffs would relish the opportunity to argue a case before the Court, the *policy underlying the doctrine of mootness counsels against* a grant of review in this case.") (emphasis added).

The California Supreme Court generally must grant or deny any petition for review within 60 days of its filing, although that court may extend the time for consideration of a petition for up to 30 days. *See id.* 8.512(b). Even if no petition for review is filed, the California Supreme Court may grant review on its own motion up to 90 days after the appellate court's decision becomes final – in other words, up to four months (or 120 days) after the decision is issued. *See id.* 8.512(c).

When the California Supreme Court accepts a case for review, briefing takes approximately 80 days, without any extensions. *See id.* 8.520(a). After the briefs are filed, the justices circulate memoranda among themselves articulating their positions on the case.[6] When a majority of the justices have agreed on a tentative resolution of the case, the case is set for oral argument.[7] The court ordinarily issues a decision within 90 days of oral argument.[8] Decisions of the California Supreme Court generally become final 30 days after the opinion is filed, and the court may extend that time for an additional 60 days. *See id.* 8.532(b).[9]

Accordingly, even under the most expeditious timetable provided under the regular application of the state-court rules of appellate procedure, it is highly unlikely that the settlement will become final before the end of this Term.

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[6] *See* Internal Operating Practices and Procedures of the California Supreme Court, Part VI, *available at* http://www.courtinfo.ca.gov/courts/supreme/documents/sc082504.pdf.

[7] *See id.*

[8] *See id.*, Part X.

[9] The overall settlement comprises two settlements with separate classes: a settlement with a class of California consumers and a settlement with a class of non-California consumers. Reliant brought claims against Powerex in the California case only. Although the respondent-plaintiffs in No. 05-85 claim in their response to the Solicitor General's brief (at 3 n.2) that Montana lacks standing to appeal the approval of the California settlement, the plaintiffs have not asserted that the California appellate court will resolve that issue on a different timetable than the one we have set forth above.

This Court could therefore be assured that its resolution of No. 05-85 would not be hindered by any threat of actual mootness of the underlying case.

B. Section 1447(d) Does Not Bar Appellate Review In No. 05-85

1. As the United States has recognized, the court of appeals in No. 05-85 correctly rejected the plaintiffs' contention that 28 U.S.C. § 1447(d) bars appellate review of the district court's determination that Powerex is not an organ of a foreign state under the FSIA. *See* No. 05-85 Pet. App. 9a-10a; U.S. Br. 14-19. Section 1447(d) states that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). This Court has held that § 1447(d)'s bar of appellate review applies only to cases remanded under § 1447(c), which authorizes remand when, at the time of removal, there is a defect in removal procedure or lack of subject-matter jurisdiction. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995).

In No. 05-85, there was neither a defect in removal procedure nor a lack of subject-matter jurisdiction. At a minimum, that case was properly removed by the British Columbia Hydro and Power Authority ("BC Hydro"), the Bonneville Power Administration ("BPA"), and the Western Area Power Administration ("WAPA"). *See* No. 05-85 Pet. App. 7a-8a.[10] It has been undisputed throughout the litigation that BC Hydro is an agency or instrumentality of a foreign state under the FSIA and that BPA and WAPA are federal agencies. As an agency or instrumentality, BC Hydro was statutorily entitled to remove the *entire* action (not just the claims against it) to federal court under the FSIA, 28 U.S.C. § 1441(d). *See* No. 05-85

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[10] Indeed, the district court correctly recognized that "the actions were properly removed in the first instance." No. 05-85 Pet. App. 20a.

Pet. App. 10a (citing *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990)); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729.1, at 239-41 (3d ed. 1998) ("Wright & Miller") (§ 1441(d) "permits the removal of the entirety of any state court action at the discretion of the foreign state") (citing cases). Independently, the federal-officer removal statute, 28 U.S.C. § 1442, authorized BPA and WAPA to remove the entire suit to federal court. *See, e.g., Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) ("'[I]t is settled that the filing of a petition for removal [under § 1442] by a single federal officer removes the entire case to the federal court.'") (quoting *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir. 1965)); *see also* 14C Wright & Miller § 3727, at 166-68, 171.

Furthermore, the district court did not lose jurisdiction once it resolved the federal issues presented by BC Hydro's, BPA's, and WAPA's defenses of sovereign immunity.[11] Instead, the court had discretion to decide the remaining claims in the case or to remand them to state court.[12] Consequently, when the district court remanded

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[11] *See District of Columbia v. MSPB*, 762 F.2d 129, 132-33 (D.C. Cir. 1985) (per curiam) ("If the federal party is eliminated from the suit after removal under [§ 1442], the district court does not lose its ancillary or pendent-party jurisdiction over the state law claims against the remaining non-federal parties."); 14C Wright & Miller § 3727, at 171 (§ 1442 "creates a species of statutorily mandated ancillary subject matter jurisdiction over the claims" against non-federal-officer defendants); *id.* § 3729.1, at 239-43; *see also Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 715 (9th Cir. 1990) ("Once a federal court acquires removal jurisdiction over a case, it also acquires jurisdiction over pendent state claims. Dismissal of the federal claims does not deprive a federal court of the power to adjudicate the remaining pendent state claims.") (citation omitted).

[12] *See District of Columbia*, 762 F.2d at 133 (when the federal officer is eliminated from the case, "the district court retains the power either to adjudicate the underlying state law claims or to remand the case to state court") (citations omitted); 14C Wright & Miller § 3727, at 171 ("[T]he district court can exercise its discretion and decline jurisdiction over the ancillary claims once the federal agency has dropped out of the case."); *id.* § 3729.1, at 242-43 (when case is removed by a foreign

the case to state court, it was not for a lack of subject-matter jurisdiction or a defect in removal procedure.[13] Therefore, the district court's remand order was not authorized by § 1447(c), and § 1447(d) thus does not bar appellate review of that order. *See Thermtron*, 423 U.S. at 345-46 (reviewing and reversing an unauthorized remand order); *Quackenbush*, 517 U.S. at 712-13 (discretionary abstention-based remand order reviewable on appeal); 14C Wright & Miller § 3740, at 534-36 (noting that courts of appeals have interpreted *Thermtron* to permit review of remand orders where the district court had discretion to hear or to remand the claims).

2. In any event, § 1447(d) does not apply in Nos. 05-85 and 05-584 for an additional and independent reason: Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right under the Act to a bench trial in federal court and to subject that sovereign to a jury trial in state court. FSIA remand orders are different from ordinary remand orders in that they resolve more than the right to a federal forum. *See* U.S. Br. 20 n.13 (making this point). When a district court rules that a foreign entity is not an agency or instrumentality of a foreign state under the FSIA, the entity loses the important right to have its case tried to the bench, rather than a jury.[14] Congress granted the right to a bench trial in the

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state under § 1441(d), district court has discretion to remand claims against other defendants).

[13] *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988) (§ 1447(c) "do[es] not apply to cases over which a federal court has pendent jurisdiction"). Although the district court mistakenly stated that it was remanding for lack of subject-matter jurisdiction, this Court has jurisdiction to determine whether the district court properly labeled its reason for remanding as falling within § 1447(c). *See* U.S. Br. 19 n.12 (citing cases).

[14] The right to a bench trial in federal court after removal is contained in § 1441(d), which provides that "*[u]pon removal* the action shall be tried by the court without jury." 28 U.S.C. § 1441(d) (emphasis added). In state court after a remand, nothing entitles the entity to avoid a jury trial, even if the state court were to disagree with the

FSIA because "[a]ctions tried by a court without jury will tend to promote a *uniformity in decision* where foreign governments are involved." H.R. Rep. No. 94-1487, at 13 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611-612; *see Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000) (explaining that the "FSIA seeks to provide uniformity in the treatment of foreign sovereigns and to remove any local bias that might be present at a jury trial in a state court"). Congress concluded that suits against foreign sovereigns must be decided in a uniform manner because "a disparate treatment of cases involving foreign governments may have *adverse foreign relations consequences*." H.R. Rep. No. 94-1487, at 13 (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 6611. Considering that paramount need for uniformity and the special right to a bench trial that is at stake in FSIA foreign-state-status determinations, Congress could not have intended those rulings to be unreviewable on appeal merely because they accompany an order of remand.[15]

C. No. 05-85 Presents A Case Of Special Concern To Canada, The United States' Largest Trading Partner

Finally, Powerex reiterates the extraordinarily important and sensitive foreign-affairs concerns weighing in favor of granting review in No. 05-85. The Federal Government of Canada and the Province of British Columbia have demonstrated the importance of this issue by submitting highly unusual certiorari-stage *amicus* briefs in support of Powerex's petition. The United States Government's recommendation that certiorari be granted is a reflection of the weighty diplomatic concerns at issue in

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federal court's determination that the entity is not an agency or instrumentality of a foreign state. *See Martinelli v. Djakarta Lloyd P.N.*, 431 N.Y.S.2d 748, 749 (N.Y. Civ. Ct. 1980) (no "section of the FSIA limits the power of state courts to try actions against foreign states to a jury").

[15] Because § 1447(d) does not apply in No. 05-584 either, it would be appropriate for the Court to grant review in that case as well as No. 05-85 and to consolidate the two cases for briefing and argument.

that case. *See* U.S. Br. 13 (explaining that the proper interpretation and application of the FSIA "is particularly important" in Powerex's cases).

No. 05-85 has been pending in this Court for more than 17 months, while Powerex has been forced to litigate cases in California state courts, a result contrary to Congress's intent in enacting the FSIA. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983) (explaining that, in enacting the FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts"). If the Court does not act expeditiously, plaintiffs will continue to haul Powerex into state courts in the Ninth Circuit. Unlike respondent KAMCO, which does not appear to be a repeat player in litigation in the United States, Powerex is one of the largest suppliers of electricity to Western States and can reasonably be expected to defend litigation in this country. For that reason as well, No. 05-85 is a better vehicle than this case because this Court's guidance as to Powerex's sovereign status would be helpful to Canada, the Province, and future litigants. Continued denial of Powerex's right to remove those cases under the FSIA, in turn, raises the specter of bringing the United States into non-compliance with its obligations under the North American Free Trade Agreement. *See* No. 05-85 Pet. 26-27.

By expeditiously granting review in No. 05-85, the Court can avoid serious diplomatic concerns that would be raised by resolving the current circuit conflict in this case rather than in No. 05-85. If the Court were to hold Powerex's petitions, grant this petition, and then grant, vacate, and remand in Powerex's cases after resolving this case, Powerex would be forced to return to the Ninth Circuit. The Ninth Circuit likely would then order additional briefing (and possibly oral argument) and issue a decision in the ordinary course. Thus, Powerex would have to litigate for perhaps two additional years or more before its right to a federal forum under the FSIA would be vindicated. Granting review in No. 05-85 now would avert that

development and the accompanying strain on the United States' relationship with its largest trading partner.

CONCLUSION

The petition for a writ of certiorari in No. 05-85 should be granted. The petitions for a writ of certiorari in this case and in No. 05-584 should be held pending resolution of No. 05-85 and then disposed of as appropriate in light of the disposition of that case. If the Court grants the petition in No. 05-85 and reverses the Ninth Circuit, it should deny the petition in this case.

Respectfully submitted,

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